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The Proposal to Prepare a Model Penal Code

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I have selected for discussion what I regard as the most important problem relevant to the proposed project, namely, the theory of the research and the methods of conducting it. It must be evident that these are the basic overall questions which will confer worth-while distinctiveness on the final product. In order to give you some definite frame of reference on which to hang my remarks, may I say that the specific problems which I think should be the first ones undertaken are: (1) Mental Disease, (2) Intoxication, (3) Sex Crimes, (4) Theft (Larceny, Embezzlement, Fraud, Receiving Stolen Property), (5) Petty Offenses—Strict Liability, and (6) Juvenile Delinquency.

The theory of the proposed research can be described in different ways, but all formulations would include: (1) intensive study of certain social problems; it would be necessary to utilize all of the known methods of research that could profitably be applied and to draw on the existing knowledge in all the relevant sciences and disciplines; (2) study of the relevant law; in first instance, this is the law of the books—the statutes, decisions, and regulations; but a thorough understanding of this body of law would include a knowledge of the forces that brought it into existence, the relevant patterns of culture, how the law actually worked, what its effects were, and what changes were made in it by legislation, judicial techniques, public opinion, and expert criticism; and (3) the research would include the answers to many legal questions which the extant literature of science and the social disciplines provides.

For example, scientific and social research on alcoholism reveals great diversity in personality types, much mental disease, and sharply differing situations. As knowledge increases, the nature of the relevant social harms changes not only because empirical knowledge reveals them more fully but also because our evaluations of certain situations as harms are themselves influenced by our factual understanding. A draftsman who "defines" harms on the basis of thorough knowledge of the relevant social problems, including personality components, will stand on relatively firm ground. He will define in terms of actual facts and behavior; and he will have ideas regarding what is significant in the actual problems, which would form the basis for sound legislation.

Equally important in the institution of adequate legal controls is knowledge of how the past relevant law has functioned and how it functions now. For example, when it was required that a thief must have been convicted before the receiver of stolen goods could be prosecuted certain unfortunate consequences occurred. When penalties are severe, certain subterfuges and fictions are indulged to evade the plain letter of the law. When there is no law defining the taking of an automobile for a "joy-ride," radical interpretations of an auto-larceny statute are common. Where "legal provocation" is greatly restricted, juries arrive at strange factual findings in order to assure desired results. Thus studies of the administration of past and present laws

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are essential to the discovery of sound substantive laws and to the demonstra-
tion of their soundness (two quite different matters). Such studies test
the validity and efficacy of past and present controls. Generalized, this
knowledge reveals the conditions of effective legal control.

In order to keep the potentially limitless problem of administration from
getting out of hand, it would be necessary to restrict it by (1) separating ad-
ministration from procedure, and largely ignoring the latter, and (2) confi-
ing it to certain limited categories, e. g., (a) statistical analysis of the
administrative process, (b) official administration (judge, jury, lawyers), (c)
public opinion, and (d) private agencies. The factors studied would vary,
depending on the problem and, within each, the investigation would be confined
to a sampling sufficient to sustain definite conclusions regarding the
operation of the law and the reasons for its success or failure.

Paralleling the investigations of the selected social problems, the sub-
stantive law, and its administration, would be investigations of the relevant
types of treatment, correction, punishment, and other reliefs and remedies.
This research would supplement the above factual studies especially as re-
gards problems of personality, and it would be concerned with the methods
of treatment, results, predictions, and so on. It would be desirable to have
one member of each research group, engaged in studying relevant social
problems, also assigned to a research group studying treatment. He could
thus bring to that group important information which would guide the de-
velopment of the treatment program.

Throughout the research numerous scientific problems would be formu-
lated in detail. Specific issues would be raised. Definite answers would be
given. Methods of analysis and research personnel would be determined
and selected with reference to the nature of each inquiry. In each investiga-
tion, the legal problems would be the central points of interest, and this im-
plies direction of the research by legal scholars who were also social scientists.

Thus, to summarize: each project would include (a) historico-socio-legal
analysis of a particular problem; (b) restatement of the existing relevant
law together with an analysis and commentary on it; (c) careful descrip-
tion of the functioning of the law; the process of change: legislation, judi-
cial techniques, prosecutor's practices, private organizations, and so on; (d)
a summary of available empirical knowledge brought to bear on the relevant,
specific legal problems; and (e) recommendations for improvement of the
law and its administration.

To assure the success of the project, there should be set up a Council on
Methods which would formulate the theory of such research in detail. It
would be especially concerned with the theory of socio-legal investigation, the
integration and use of the relevant knowledge derived from the sciences and
disciplines, a critique of methods, and a model study to guide the various re-
searchers.

The emphasis on methods should not terminate in generalizations formu-
lated by persons who remained outside the actual research. The members of
the Council on Methods should be closely associated with the research groups.
Each research group should deliberate on the methods to be employed in the
solution of its particular problem. Its program should be pointed at and
stated in terms of the particular problem to be studied. Each group would
submit its formulation of methods for criticism by the Council. A member
of the Council should be assigned to parallel the actual conduct of the re-
search by pertinent inquiries regarding the methods employed, the recording
of the data to permit verification, the significant formulation of conclusions,
and so on. In short, the objective must be not debate on methods, but the
use of the best methods, the assurance that these are known and employed so
far as possible and feasible. The articulation of the methods to be used will
help enormously if only because it will facilitate self-criticism. It will also
help to support the conclusions finally reached and to defend them against
unsound criticism. The information acquired in the various researches noted
above would become the basis of various drafts of laws on each major type
of social problem. After passing the critical scrutiny of the group which
carried on a particular investigation, each draft would go (a) to a Commit-
tee on Legal Controls for general review and (b) to a central Drafting Com-
mittee for improvement in form and interrelation with the other proposed
enactments. Thus a Code would emerge as a natural product of the various
detailed investigations. It would be significant and defensible by references
to the relevant specific researches.

The Code should not be stressed in the early stages of the work. Scholars
in various sciences and disciplines can be united in cooperation if the dominant
bond is scientific in the sense of discovery of what happened and what goes
on now. Although it would be fatuous to imagine that value-judgments
could be excluded from any part of the work, it is also noteworthy that where-
as disagreement commonly attends broad programs of reform, there is often
agreement on specific factual problems and even on specific reforms if they
are considered directly in relation to detailed factual studies.

Finally, and most important, a new type of literature could be invented—an
integration of law, science, and social discipline. This literature would be
the product of the socio-legal research carried on in the ways indicated above
and of the distinctive character of the objectives sought. It would include a
record of the empirical knowledge relied upon, the policies adopted and the
reasons supporting them, and the specific conclusions reached. These records
would constitute the ultimate bases of the proposed Code. The various parts
of this record would be submitted to experts in different fields for specific
criticism. In final form, they would for the most part represent a consensus
of expert opinion. Anyone who examined the Code could refer to the rele-
vant empirical and legal knowledge and the policies relied upon. Criticism
could be specific and significant.

For example, the group studying certain harms committed by intoxicated
persons and proposing a series of laws, to be part of the Code, would write
an appropriate summary of the relevant knowledge on alcoholism, including
the types of personality involved, the various diseases met, the relevant psy-
chiatric and social data, and so on. These would be written not in the form
of a treatise but succinctly with direct reference to the problems of legal con-
trol. Upon completion, this summary of the relevant empirical knowledge
would be submitted to many experts for their comments and criticism.
Where a consensus of the experts could not be obtained, that fact would be
stated.

Similar methods and checks would be used regarding the studies of ad-
ministration and the analyses of policy. We would know where we stood
with reference to the best knowledge available. And, as a result of the com-
pletion of the above studies, there would be created an organization of per-
sons qualified to carry on socio-legal research and to codify the results.
If adequate facilities are made available the objectives outlined above can certainly be attained. That accomplishment would have very great significance for similar endeavors in many fields. The approaches to the problems, the methods of research, the provision of a validating record of empirical knowledge and the grounds of policy, the relation of the Code to such determinate data, the creation of an organization which had demonstrated its effectiveness—these and other benefits would result. The long range effects cannot be precisely anticipated, but their importance cannot be doubted. Those who direct the project should be mindful of the larger implications of its successful completion.